IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR
(through web-based video conferencing platform)

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 44/JAB/2020
(Asst. Year: 2017-18)

ACIT, Circle-2(1), Jabalpur.	vs.	Mahakaushal Sugar & Power Industries Ltd., Narsinghpur. [PAN : AAECM 3666 P]
(Appellant)		(Respondent)

Appellant by	:	Shri Sanjay Kumar, CIT-DR
Respondent by	:	Shri Rahul Bardia, FCA
Date of hearing	:	02/09/2022
Date of pronouncement	:	29/11/2022

O R D E R

Per Sanjay Arora, AM:

This is an Appeal by the Revenue agitating the Order dated 01/7/2020 by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short), allowing the assessee's appeal contesting it's assessment under section 143(3) dated 24/12/2019 of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2017-18.

2. The appeal raises two issues, which we shall take up in seriatim. Ground # 1 is in respect of an addition for u/s. 69 for Rs. 411.98 lacs in respect of what the assessee claims to be an addition to it's plant and machinery during the relevant previous year. The assessment order (at para 1, pg. 3) notes that the assessee did not, on being called upon to, furnish the purchase bills and vouchers for the plant and machinery claimed to be purchased and, further, could not establish the source

of payment thereof. The ld. CIT(A) allowed the assessee's claim as the bills and vouchers had been submitted online at E-portal and, two, the source of payment/s finds reflection in the assessee's regular accounts, duly audited, so that there is no scope for invocation of section 69. Aggrieved, the Revenue is in appeal.

3. We have heard the parties, and perused the material on record.

3.1 If the assessee did not indeed furnish the bills and vouchers vide which it claims to have purchased the plant and machinery during the relevant year, the only consequence thereof would be the disallowance of deprecation claimed thereon; the investment therein being duly reflected in the assessee's accounts, which thus also bear the source of payment therefor, none of which, finding mention in the assessee's accounts, has been doubted by the Assessing Officer (AO). So, however, there being nothing on record to exhibit the said furnishing, even if online, of purchase bills and vouchers, the assessee was called upon to adduce the same. This is as an absence thereof would entail disallowance of depreciation, even as endorsed by the ld. CIT(A) in his order. It, therefore, becomes incumbent to record a finding in its respect. In the very least, the matter would therefore require being restored to the file of the AO to observe the principle of natural justice. On the next date of hearing, Sh. Bardia would refer to the assessee's letter dated 16/12/2019 vide which, in response to the AO's requisition vide letter dated 21/11/2019 in the assessment proceedings, the said bills and vouchers were submitted thereto online. The ld. CIT-DR would seek further time to obtain a response from the AO. In our view, no room for any doubt obtains. Copy of bills stand furnished in the assessee's paper-book (PB pg. 1-38). The assessee's accounts are audited (PB pgs. 380-445). The same do not reflect any adverse opinion or reservation by the Auditor. Further, as clarified by Sh. Bardia during hearing, he had personally verified the said submission on the assessee's e-portal. It being the Revenue's appeal, it was rather incumbent on it to have substantiated it's claim as to non-submission of the relevant documents, claimed as furnished online, in the first place, which it does not in spite being

allowed adequate time for the same, with, on the contrary, assessee adducing material on record toward the said submission, endorsed by a statement at bar by it's ld. counsel. The Revenue, accordingly, fails on it's Gd. 1, with we having clarified that no case for an addition u/s. 69 stands, in any case, made out, and that the only possible consequence of non-substantiation of it's claim of having acquired plant and machinery would be non-allowance of depreciation – for the current and even subsequent years (*Maharana Mills P. Ltd. v. ITO* [1959] 36 ITR 350 (SC)), no case for which, again, stands made out by the Revenue; it failing even to respond to the opportunity to do so by us.

4. The second Ground of the Revenue's appeal is in respect of the maintainability in law and in the facts and circumstance of the case, of deduction claimed u/s. 80-IA at Rs. 253.43 lacs. The basis of the AO's disallowance is the letter dated 29/4/2017 by the assessee to Madhya Pradesh Power Management Company Limited (MPPMCL)(PB pg. 72) seeking sanction for approval for commissioning and trial run the plant and machinery installed for power generation (at 12.8 MW). The same, as per the Revenue, by itself proves that no approval had been allowed till then, nor is there anything on record to show, or indeed even a claim *qua*, any subsequent approval. The assessee's claim of having commissioned the power plant and generation (of 10294804 units) of power from bagasse for captive consumption, on the 'profit' derived from which activity deduction u/s. 80-IA(1) had been claimed, could not therefore be allowed. The assessee's case, on the other hand, is that as despite repeated reminders no approval was forthcoming, it operated the power plant without the said approval, which was essentially for injecting the power produced into the power grid, i.e., for supply in the 33KV line laid for the purpose. The plant was run below capacity at 5 MW, i.e., as required for it's sugar division. Necessary evidence toward the same stands furnished before the ld. CIT(A), being at PB pgs.1-38, who has allowed the assessee's claim for deduction u/s. 80-IA on that basis.

5. We have heard the parties, and perused the material on record.

5.1 The assessee had been allowed an in-principle approval for setting-up a 12.8 MW power plant by the Ministry of Commerce & Industry, GoI, for producing power from the bagasse generated on it's sugar production. The in-principle approval by MPPMCL dated 30/10/2015 for purchase of power (12.8 MW) from the assessee was for validity up to 31/03/2016, which was later extended up to 31/7/2017. However, no approval for injecting the power so generated in the 33 KV lines installed for transmission into the power grid (power distribution network) was allowed. The assessee, accordingly, operated the power plant at below capacity, at 5 MW, i.e., as required for captive consumption by it's Sugar Division for the crushing season 2016-17, which started on 29/10/2016. The evidences adduced by the assesse to this effect, being, boiler operation sheet; turban working sheet; calculation sheet for power generated; besides transfer of bagasse from sugarcane to power division, have not been denied or rebutted before us in any manner. The old turbine, generating 5 MW power, for such user, was, as explained to us by Sh. Bardia as not put the use, though depreciation thereon stands claimed, albeit for and under the sugar division. We, accordingly, find no reason for the denial of the eligibility for deduction u/s. 80-IA on the profit derived from power generation, captively consumed by it's sugar division. We are to this extent in agreement with the ld. CIT(A). The same, however, only decides the aspect of the assessee's eligibility for the said deduction, and no further. The ld. CIT(A) could not have possibly confirmed the deduction at the quantum claimed; the evidences led, and the case set-up by the assessee before him, which stands reiterated before us, extending only to finding the assessee's eligibility to claim deduction u/s. 80-IA in respect of the profit derived from it's newly set-up power unit. He ought to have remitted the matter back to the AO for the purpose, or, if regarded as constrained by law to do so, either decided the said aspect himself or called for a remand report from the AO in the matter after hearing the assessee – who has never been called upon to state it's case in the matter. This is as this only

would conclude the matter in respect of the assessee's claim *qua* deduction u/s. 80-IA, denied in assessment in full.

5.2 The issue in respect of the quantum of deduction has, as apparent, two components, i.e., the sales (revenue) and the cost of sales. The revenue has been, as informed, booked at Rs. 6.28 per unit of power, i.e., the rate at which the state government (through it's relevant agency) had signified it's willingness to source power from Units, as the assessee's, generating power from a renewable source, as bagasse. The basis for the adoption of the said rate by the assessee is that the same was *proposed for being paid* thereto by the Government on supply to it's grid (distribution network), which though did not mature as no approval for the said supply was given and, in fact, despite the assessee moving the Hon'ble jurisdictional High Court for the same under it's writ jurisdiction. Apart from the fact that no such rate stands actually allowed to it, the said rate is, as admitted before us, an incentivized rate by the Government of the day toward, as explained by Sh. Bardia, a changeover from fossil fuel based to renewal energy based power generation. No industry would, Sh. Bardia would continue, set-up a power plant, which the assessee does by investing over Rs. 40 cr. in plant and machinery, if the Government had not offered such a rate. That the said rate did not materialize, is another matter. The said rate, he further clarified on being queried thereon, which was initially up to 31/3/2016, stood extended up to, firstly, 31/7/2016, and, later, up to 19/8/2021, i.e., till the announcement of the new tariff (at rs. 5.71 per unit), for which reference was made by him to new tariff policy (for renewable energy) of August, 2021, to take effect from the date of its issue afore-stated, in substitution of the earlier policy of 2013.

5.3 We find the argument as misconceived, both on facts and in law. Toward the latter, the relevant part of Section 80-IA, as well as section 92F, reads as under: –

Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

80-IA (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise …..

(2) to (4)…….

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date :

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means—

(*i*) the price that such goods or services would ordinarily fetch in the open market; or

(*ii*) the arm's length price as defined in clause (*ii*) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.

(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

Provided that in case the aforesaid arrangement involves a specified domestic transaction referred to in section 92BA, the amount of profits from such transaction shall be determined having regard to arm's length price as defined in clause (ii) of section 92F.

Definitions of certain terms relevant to computation of arm's length price, etc.

92F. In sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires-

(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;

The same clearly adverts to the 'market price' of the goods and services being captively consumed. 'Market' would only mean an open market, i.e., in as uncontrolled a condition as is under the circumstances possible, which is also the sense and understanding conveyed by reference to the 'arm's length transaction', so that the two options, per the relevant clauses of the *Explanation*, are in harmony. That is, the argument defeats the assessee's case for the adoption of the rate of rs. 6.28 per unit in-as-much as the same is admittedly an incentivized rate, allowed or, rather, envisaged to be so, to provide a fillip to power generation from renewable energy sources. The Government may have several reasons/ considerations to allow (or not allow) a particular rate to a particular industry/ sector or for sourcing power from a particular source of energy, viz. promotion, cross-subsidization, discouragement, etc., using the rate as an instrument of policy. Why, it may well purchase power supplied into its grid at the normal rate, i.e., at which it itself sells power, while at the same time allowing subsidy, for a defined time and at a particular rate, for which it may provide separate funding to the buyer, being the Undertaking charged with the supply and distribution of power in the State. Further, it may, either in conjunction or in the alternative, allow capital subsidy to power plants. Power is not a good/service that can be freely supplied even by one who has been allowed to generate the same. That same has necessarily to be supplied to person/bodies authorized by law to produce and/or sell the same, as MPPMCL in the State of Madhya Pradesh. *As such, the rate at which power is supplied by it to the assessee, or even to the industry at large, would be the relevant rate*. This is even otherwise understandable as in the event of no power generation, or the same being at less than the assessee's requirement, it would have to purchase (the balance) power (for it's Sugar Division) only therefrom. The proposed rate – which in fact did not materialize, cannot be regarded as the rate at which the assessee's sugar division is to be billed by it's power division for power consumption. Even as observed by the Bench during hearing, the imperatives which led the Government to formulate a policy for promotion of power

generation from renewable energy sources, announcing, assuming so, attractive rates, or which led to the withdrawal thereof, explained to us as the onslaught of thermal power units producing cheaper power – which seems a contradiction inasmuch as thermal power is also a fossil fuel based, is an irrelevant circumstance and a consideration extraneous to valuing the goods and services in arriving at the profit on the supply thereof for captive consumption u/s. 80-IA, which is to be *sans* any ulterior consideration, but guided solely by the market conditions; the market price signifying an equilibrium of demand and supply forces.

5.3 The interpretation of the provision of s.80IA apart, it is even otherwise trite law that it is only the real, as opposed to, hypothetical income, that is to be subject to tax, and toward which we may refer to some decisions, viz. *UCO Bank v. CIT* [1999] 237 ITR 889 (SC); *Godhra Electricity Co. Ltd. v. CIT* [1997] 225 ITR 746 (SC), *CIT v. P. Mariappa Gounder* [1984] 147 ITR 676 (Mad). As such, only the income actually accrued, and which in turn is liable to be reckoned with reference to the purchase cost of power that the sugar division would be required to pay in the normal course of its business, or that for which it is being actually bought by it during the relevant year, also embedded in the arm's length principle enshrined in ss. 80IA(8) and 92F. This is as any other rate would not have its basis in facts. Integral to the concept of accrual of income is the concept of prudence and conservatism, the fundamental accounting assumptions which would preclude accounting as income anything beyond that is reasonably certain for realisation. Surely, any price beyond the cost that the sugar division would otherwise, i.e., but for its purchase from the power division, have to incur, cannot be said to have its basis in economic reality. Needless to add, an actual receipt at the proposed rate (of Rs. 6.28 per unit), where so, would stand to substitute this rate, which thus in any case gets based on actuals. This would also meet the assessee's charge, assuming so, that the market price, in view of the controlled market, does not actually represent an equilibrium of demand and supply forces.

5.4 The second component of the profit is 'cost of sales'. As the sale is to be adopted on 'arm's length basis', i.e., as two independent entities would transact, the cost would also include both direct and indirect costs. The principal raw material, bagasse, is stated in the Notes to the Accounts, to be purchased at Rs. 35 per Qtl., i.e., the prevailing market price, which, where so, merits acceptance. The administration (indirect) cost is stated to the proportioned on sale basis, which is again reasonable, though would require to be modified with reference to the sale value of power (to sugar division) as finally adopted. Further, as it appears, no separate books of account have been maintained for the two businesses, with Shri Bardia informing that the old turbine was regarded as a part of sugarcane division, and depreciation thereon allocated thereto which, again needless to add, would be with reference to the assets employed with the two divisions, allocating the depreciation of common assets on some reasonable basis.

5.5 We, accordingly, allowing the assessee's plea in principle, i.e., that the power division constitutes an 'eligible business' u/s. 80IA(1), on the profit of which therefore deduction thereunder is exigible, restore the matter for determination of the quantum of deduction, on which there has been no examination and, consequently, findings by both the Revenue authorities, back to the file of the AO. The purpose of the afore-discussion is not to foreclose or predetermine the matter, but to explain the clear law impinging on the matter. The matter, in fact admits of no dispute in principle, with the assessee itself per its Notes to the Accounts clarifying that the inter-unit transfers have been recorded at prevailing market prices, so that all that survives is the verification of it's claims. It is open for the assessee (or for that matter the Revenue) to make out a case inconsistent or in disagreement, wholly or partly, with what stands stated by us toward the same, of course meeting the law as explained herein, and in which case it shall be incumbent on the AO to consider and adjudicate the same, besides being obliged to do so in accordance with law by issue definite finding/s of fact and observing the principles of natural justice. In other words, the discussion aforesaid

on the quantum of deduction shall not operate to prejudice either side, but is with a view to facilitate the same, focussing on the relevant variables, in terms of the law explained by the higher courts of law.

5.6 We decide accordingly.

6. In the result, the Revenue's appeal is partly allowed for statistical purposes.

Order pronounced in open Court on November 29, 2022

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 29/11/2022
vr/-

Copy to:

1. The Appellant: ACIT, Circle-2(1), Jabalpur
2. The Respondent: M/s. Mahakaushal Sugar & Power Industries Ltd., Narsinghpur.
3. Principal CIT-1, Jabalpur (MP)
4. CIT(A)-1, Jabalpur (MP)
5. The CIT-D.R., ITAT, Jabalpur.
6. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.